

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time)
for Permit S-52622, Water Right Application S-80672) PROPOSED FINAL
in the name of Logan Rudkin) ORDER

Permit Information

Application:	S-80672
Permit:	S-52622
Basin:	Rogue / Watermaster District 14
Date of Priority:	November 29, 1995
Source of Water:	Two unnamed springs, tributaries of Elder Creek
Purpose or Use:	Domestic use for two households, further limited to human consumption only during the period listed under "Period of Use"; being March 1 through April 30 and July 1 through January 31 of each year for domestic use; February 1 through February 29 and May 1 through June 30 of each year for human consumption only
Maximum Rate:	0.01 cubic foot per second (cfs)

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 1999, to October 1, 2014.
- Grant an extension of time to apply water to full beneficial use from October 1, 2000, to October 1, 2014.¹

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

¹ Pursuant to ORS 537.230(4), upon the completion of beneficial use of water allowed under the permit, the permit holder shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permit holder shall submit a map of the survey and the claim of beneficial use.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Water Resources Department
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
cfs – cubic feet per second
FOF – Finding of Fact
COBU – Claim of Beneficial Use

AUTHORITY

Generally, see **ORS 537.230** and **OAR Chapter 690 Division 315**.

ORS 537.230(3) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which irrigation or other works shall be completed or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under **ORS 539.010(5)** and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

ORS 539.010(5) instructs the Director to consider: the cost of the appropriation and application of the water to a beneficial purpose; the good faith of the appropriator; the market for water or power to be supplied; the present demands therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in **OAR 690-315-0040(1)** including a finding that there is “good cause” to approve the extension. **OAR 690-315-0040(2)-(4)** contains the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On August 28, 1996 Permit S-52622 was issued by the Department. The permit authorizes the use of up to 0.01 cfs of water from two unnamed springs, tributaries of Elder Creek, for domestic use for two households, further limited to human consumption only during the period listed under “Period of Use”; being March 1 through April 30 and July 1 through January 31 of each year for domestic use; February 1 through February 29 and May 1 through June 30 of each year for human consumption only. The permit specified actual construction was to begin by August 28, 1997, construction of the water system was to be completed by October 1, 1999, and complete application of water was to be made on or before October 1, 2000.

2. On August 5, 2011, the Department received a Claim of Beneficial Use for review.
3. On January 5, 2017, an assignment from Contessa Lorraine Garnier to Logan Rudkin was recorded in the records of the Water Resources Department.
4. On March 29, 2017, the permit holder, Logan Rudkin, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to complete construction of the water system be extended from October 1, 1999, to October 1, 2014, and the time to apply water to full beneficial use under the terms and conditions of Permit S-52622 be extended from October 1, 2000, to October 1, 2014. This is the first permit extension requested for Permit S-52622.
5. On April 4, 2017, notification of the Application for Permit S-52622 was published in the Department's Public Notice. No public comments were received.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

6. On March 29, 2017, the Department received a completed Application and the fee specified in ORS 536.050 from the permit holder.

Start of Construction [OAR 690-315-0040(1)(b) and 690-315-0040(5)]

7. Actual construction of the water system began prior to the August 28, 1997 deadline specified in the permit. According to the permit holder, construction of the water system began in 1978 with the development of Spring #2.
8. According to the Notice of Beginning of Construction (Form A) submitted to the Department December 23, 1996, actual construction began December 14, 1996. The original permit holder cut a trail and removed rocks at the upper spring site, dug test holes at the lower spring site, and placed a culvert to prevent erosion.

Based on Finding of Fact (FOF) 7 and 8, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.

Amount of Construction [OAR 690-315-0040(3)(a)]

The amount of construction completed within the time allowed in the permit.²

9. Construction of the water system began prior to the August 28, 1997 deadline specified in the permit.
10. Work was accomplished during the original development time frame under Permit S-52622. The work accomplished consisted of completing development of Spring #2.
11. Since October 1, 2000, the permit holder has accomplished the following construction required under S-52622:
 - Installed an above ground 325 gallon storage tank for Spring #1;
 - Installed 485 feet of ¾ inch poly hose, and 150 feet of 5/8 inch hose above ground; and
 - Installed a water meter.

The Department has determined based on Finding of Fact (FOF) 9 and 10, that work has been accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

Compliance with Conditions [OAR 690-315-0040(3)(c)]

The water right permit holder's conformance with the permit conditions.

12. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed by October 1, 2000, and (2) annual

² "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

reports of the amount of water used each month have not been received by the Department by October 1, 2000.

13. On August 5, 2011, the Department received a Claim of Beneficial Use (COBU), which stated that a water meter was installed on June 30, 2011.
14. Department records show annual water use reports have been submitted for water years 2012 and 2013.

The Department has determined based on FOF 13 and 14, that the permit holder has demonstrated compliance with following permit conditions as required by Permit S-52622, after the date specified in the permit:

- “Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director.”

Beneficial Use of Water [OAR 690-315-0040(3)(b)]

The amount of beneficial use made of the water during the permit time limits.

15. The Application states a maximum rate of 0.00079 cfs of water has been diverted from Spring #1, tributary of Elder Creek, for domestic use and human consumption for one household.
16. According to the COBU received by the Department on August 5, 2011, Spring #2 has not been perfected by the permit holder for use of water under Permit S-52622.

Based on FOF 12, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2000.

Financial Investments to appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0040(2)(b),(3)(d),(4)(d)]

17. The Application states the permit holder has invested approximately \$935, which is the total projected cost for complete development of this project.

The Department has determined based on FOF 17, that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions; a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit S-52622.

The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]

The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

OAR 690-315-0040(4)(a)

The amount of water available to satisfy other affected water rights and scenic waterway flows.

18. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit S-52622; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an application for a new water right is submitted.
19. Current Water Availability Analysis for Elder Creek, (Tributary of East Fork Illinois River) at the mouth (watershed ID 70978) shows that no water is available at the 80% exceedance level.

OAR 690-315-0040(4)(b)

Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem

areas or water quality limited sources established under 33 U.S.C. 1313(d).

20. The points of diversion are located on tributaries of Elder Creek, and are not located within a Withdrawn Area.
21. Elder Creek is located above the Illinois Scenic Water Way.
22. The points of diversion are not in a location listed by the Department of Environmental Quality as a water quality limited stream.

OAR 690-315-0040(4)(c)

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

23. Elder Creek is located within an area ranked "highest" for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

OAR 690-315-0040(4)(d)

Economic interests dependent on completion of the project.

24. The Application states an approximate total of \$935 has been invested in the project.

OAR 690-315-0040(4)(e)

Other economic interests dependent on completion of the project.

25. The Application did not identify economic interests other than those of the applicant's that may be dependent on completion of the project.

OAR 690-315-0040(4)(f)

Other factors relevant to the determination of the market and present demand for water and power.

26. No other factors relevant to the determination of the market and present demand for water and power have been identified.

OAR 690-315-0040(2)(f)

Fair Return Upon Investment

27. The Application did not identify that the use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

OAR 690-315-0040(2)(g)

Other Governmental Requirements

28. The Application did not identify any delay in the development of this project that was caused by any other governmental requirements.

Unforeseen Events [OAR 690-315-0040(2)(h)]

29. The Application states that Spring #2 is located near the property line that separates tax lot 600 and tax lot 607, causing a feud between neighboring land owners. Both neighbors believed that Spring #2 was located on their land, which resulted in the water delivery system being vandalized several times, restricting the permit holder's ability to complete development of the project in a timely manner.

Denial of an Extension Would Result in Undue Hardship [OAR 690-315-0040(2)(i)]

30. The Application did not state if a denial of the extension would result in undue hardship.

Good Faith of the Appropriator [OAR 690-315-0040(2)(c)]

31. The Department has found good faith of the appropriator under Permit S-52622.

Based on FOF 7 through 11, 13, 14, 15, 17, and 24, the Department has determined that the applicant has shown good faith and reasonable diligence.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

32. As of March 29, 2017, the permit holder states the water system is complete. An Extension of Time is needed to demonstrate compliance with conditions, and apply water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2014, and to accomplish the application of water to beneficial use under the terms and conditions of Permit S-52622 is both reasonable and necessary.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

CONCLUSIONS OF LAW

1. The Applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The Applicant complied with construction timeline requirements to begin actual construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 7 through 31, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2014³, as required by OAR 690-315-0040(1)(c).
4. The Applicant can complete the project within the time period requested for the extension on the project. OAR 690-315-0050(5).
5. The Applicant has demonstrated good cause for the extension. OAR 690-315-0050(5).

Continued on the following page

³Pursuant to ORS 537.230(3), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

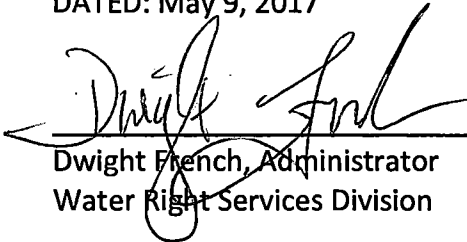
PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Extend the time to complete construction of the water system under Permit S-52622 from October 1, 1999, to October 1, 2014.

Extend the time to apply water to beneficial use under Permit S-52622 from October 1, 2000, to October 1, 2014.

DATED: May 9, 2017


Dwight French, Administrator
Water Right Services Division

*If you have any questions,
please check the information
box on the last page for the
appropriate names and
phone numbers.*

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100(1) and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **June 23, 2017**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.
2. A written protest shall include:
 - a. The name, address and telephone number of the petitioner;
 - b. A description of the petitioner's interest in the proposed final order and if the protestant claims to represent the public interest, a precise statement of the public interest represented;
 - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
 - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - e. Any citation of legal authority supporting the petitioner, if known;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.

3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
- a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

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- If you have any questions about statements contained in this document, please contact Corey A Courchane at (503) 986-0825.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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